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WIRELINE COMPETITION BUREAU SEEKS COMMENT ON REMANDS OF *VERIZON 6 MSA FORBEARANCE ORDER* AND *QWEST 4 MSA FORBEARANCE ORDER*

PLEADING CYCLE ESTABLISHED

WC Docket Nos. 06-172, 07-97

Comment Date: September 21, 2009

Reply Comment Date: October 6, 2009

In this public notice, we seek comment on remands by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) of two related Commission orders. On June 19, 2009, the D.C. Circuit issued an opinion and remanded the *Verizon 6 MSA Forbearance Order* to the Commission.¹ On August 5, 2009, the D.C. Circuit remanded the *Qwest 4 MSA Forbearance Order* at the Commission's request.² Because the issues in the *Verizon 6 MSA Forbearance Order* substantially overlap with those in

¹ *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21294, para. 1 (2007) (*Verizon 6 MSA Forbearance Order*), remanded, *Verizon Tel. Cos. v. FCC*, No. 08-1012, slip. op. (D.C. Cir. June 19, 2009) (*Verizon v. FCC*). Specifically, Verizon sought forbearance in the 6 Metropolitan Statistical Areas (6 MSAs) for its mass market switched access services from the following: tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. *Id.* Verizon also sought forbearance from loop and transport unbundling obligations under section 251(c)(3) of the Communications Act of 1934, as amended (the Act), and all *Computer III* obligations (e.g., open network architecture (ONA) and comparably efficient interconnection (CEI) requirements). *Id.*

² *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11730, para. 1 (2008) (*Qwest 4 MSA Forbearance Order*), remanded, *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (*Qwest Corporation v. FCC*). For mass market and enterprise services, Qwest sought forbearance from dominant carrier tariffing requirements in Part 61 of the Commission's rules; Part 61 price cap regulations; dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control; and for certain of Qwest's services, *Computer III* requirements including CEI and open network architecture ONA requirements. *Id.* Qwest also sought forbearance in the 4 MSAs from loop and transport unbundling obligations pursuant to sections 251(c) and 271(c)(2)(B)(ii) of the Act. *Id.*

the *Qwest 4 MSA Forbearance Order*,³ we seek comment on how the Commission should reconsider its analysis in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* in light of the D.C. Circuit's guidance in the *Verizon v. FCC* opinion.⁴

I. *Verizon v. FCC*

On September 6, 2006, Verizon filed six petitions seeking forbearance from certain regulations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. On December 5, 2007, in the *Verizon 6 MSA Forbearance Order*, the Commission concluded that the record evidence in the 6 MSA proceeding did not satisfy the statutory section 10 forbearance standard with respect to any of the forbearance Verizon requested, and, accordingly, the Commission denied the requested relief in the 6 MSAs.⁵ On January 14, 2008, Verizon filed an appeal of the *Verizon 6 MSA Forbearance Order* in the D.C. Circuit. Specifically, Verizon appealed the Commission's decision denying Verizon forbearance relief from section 251(c)(3) unbundling obligations in the 6 MSAs.⁶

On June 19, 2009, the D.C. Circuit issued an opinion and remanded the *Verizon 6 MSA Forbearance Order* to the Commission for further consideration on the "limited ground" that the Commission had not explained its departure from precedent.⁷ In particular, the court found that the Commission, without explanation, "changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace."⁸ The court clarified that it may be reasonable for the Commission, in certain instances, to use the market share of an incumbent local exchange carrier (LEC) "as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete."⁹ The court further clarified that it may "be reasonable for the [Commission] to consider only evidence of actual competition rather than actual and potential competition."¹⁰ The court concluded, however, that "it is arbitrary and capricious for the [Commission] to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past."¹¹

³ See Motion of the Federal Communications Commission for a Voluntary Remand, No: 08-1257, at 2 (D.C. Circuit filed July 17, 2009) (FCC Motion for Qwest 4 MSA Remand).

⁴ On March 24, 2009, Qwest filed a new petition requesting forbearance in the Phoenix MSA. See Pleading Cycle Established for Comments on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, *Public Notice*, DA 09-1653 (WCB Jul. 29, 2009) (establishing deadlines of August 28, 2009 for comments on Qwest's petition and September 28, 2009 for reply comments). Those deadlines have been extended to coincide with the pleading cycle established in this public notice. See Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, *Public Notice*, DA 09-1836 (WCB Aug. 20, 2009).

⁵ *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1; see 47 U.S.C. § 160.

⁶ *Verizon v. FCC*, slip. op. at 2-3.

⁷ *Id.* at 3.

⁸ *Id.* at 18; see also *id.* at 12 ("If the FCC changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed." (citing cases)).

⁹ *Id.* at 17-18.

¹⁰ *Id.* at 18.

¹¹ *Id.*

Accordingly, we seek comment on the court's decision and what actions the Commission should take to satisfy the court's concerns.¹² On remand, to what extent, if at all, should the Commission depart from its recent precedent regarding marketplace analysis in forbearance petitions, including the *Qwest Omaha Forbearance Order* and *ACS UNE Forbearance Order*?¹³ What evidence, beyond Verizon's market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted? How does "the existence of potential competition . . . affect [the Commission's] section 10 forbearance analysis"?¹⁴ What other issues are relevant to the Commission's resolution of Verizon's forbearance petitions and what additional factors should the Commission take into account in its analysis? To what extent should any changes in the marketplace or Commission actions since the time the Commission issued the *Verizon 6 MSA Forbearance Order* affect the Commission's decision?¹⁵

II. *Qwest Corporation v. FCC*

Related to the remand of the *Verizon 6 MSA Forbearance Order* is the D.C. Circuit's remand of the *Qwest 4 MSA Forbearance Order*.¹⁶ On April 27, 2007, Qwest filed four petitions seeking certain forbearance relief in specific areas in the Denver, Minneapolis-St. Paul, Phoenix and Seattle MSAs. On July 25, 2008, using the same general analytical approach as in the *Verizon 6 MSA Forbearance Order*, the Commission concluded that the record evidence did not satisfy the section 10 forbearance standard with respect to any of the forbearance Qwest requested and denied the requested relief in the four MSAs.¹⁷ On July 29, 2008, Qwest filed an appeal of the *Qwest 4 MSA Forbearance Order* with the D.C. Circuit. During the pendency of that appeal, the D.C. Circuit rendered its decision in *Verizon v. FCC*. Because the issues in the *Qwest 4 MSA Forbearance Order* and in the *Verizon 6 MSA Forbearance Order* overlap,¹⁸ the Commission requested on July 17, 2009, that the D.C. Circuit remand the *Qwest 4 MSA*

¹² *Id.* at 19 (stating that the Commission can either articulate its departure from its precedent or consider whether competition might be established by some evidence other than whether an incumbent LEC has met a market share benchmark).

¹³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (*Qwest Omaha Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) (*ACS UNE Forbearance Order*), *appeals dismissed*, *Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing).

¹⁴ *Verizon v. FCC*, slip. op. at 19.

¹⁵ Treatment of confidential information and highly confidential information filed in the Verizon 6 MSA docket continues to be governed by the two protective orders adopted in this proceeding. *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Order, 21 FCC Rcd 10177 (WCB 2006) (*Verizon 6 MSA First Protective Order*); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Order, 22 FCC Rcd 892 (WCB 2007) (*Verizon 6 MSA Second Protective Order*).

¹⁶ *Qwest Corporation v. FCC*.

¹⁷ *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 117, para. 1.

¹⁸ FCC Motion for Qwest 4 MSA Remand at 3 (stating that Qwest indicated "that a central dispute in this case involved essentially the same market share issue that had been raised in [*Verizon v. FCC*].")

Forbearance Order.¹⁹ On August 5, 2009, the D.C. Circuit granted the Commission's unopposed motion for voluntary remand of the *Qwest 4 MSA Forbearance Order*.²⁰

The Commission in the *Qwest 4 MSA Forbearance Order* considered whether to grant Qwest forbearance relief from the same unbundling requirements in the 4 MSAs as in the *Verizon 6 MSA Forbearance Order*.²¹ The Commission also gave weight to the fact that Qwest had retained a specified percentage of the retail market in each MSA.²² Therefore, we ask the same questions identified above concerning the Commission's analysis in the *Qwest 4 MSA Forbearance Order*.²³ In particular, we seek comment on how the Commission should reconsider its analysis in the *Qwest 4 MSA Forbearance Order* in light of the D.C. Circuit's guidance in the *Verizon v. FCC* opinion.

Interested parties may file comments on or before **September 21, 2009** and reply comments on or before **October 6, 2009**. All pleadings should reference **WC Docket No. 06-172 and WC Docket No. 07-97**.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Suite TW-A325, Washington, DC 20554. Parties should also send a copy of their filings to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, or by e-mail to CPDcopies@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com. Pursuant to the protective orders adopted in WC Docket Nos. 06-172 and 07-97, all parties should submit an electronic copy of filings containing Confidential and Highly Confidential Information to Tim Stelzig (Tim.Stelzig@fcc.gov) and Denise Coca (Denise.Coca@fcc.gov).²⁴

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

¹⁹ *Id.*

²⁰ *Qwest Corporation v. FCC*.

²¹ See *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11730, para. 1; *Verizon 6 MSA Forbearance Order*, 22 FCC Rcd at 21294, para. 1.

²² See *Qwest 4 MSA Forbearance Order*, 23 FCC Rcd at 11754-56, para. 36.

²³ See *supra* at 2-3; *Verizon v. FCC*. Treatment of confidential information and highly confidential information filed in the *Qwest 4 MSA* docket continues to be governed by the two protective orders adopted in this proceeding. *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, First Protective Order, 22 FCC Rcd 10129 (WCB 2007) (*Qwest 4 MSA First Protective Order*); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Second Protective Order, 22 FCC Rcd 10134 (WCB 2007) (*Qwest 4 MSA Second Protective Order*).

²⁴ See *supra* notes 15 & 23.

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov and include the following words in the body of the message: get form <your email address>. A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. **Parties are strongly encouraged to file comments electronically using the Commission's ECFS.**

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

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Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-488-5300, facsimile 202-488-5563, or via e-mail at fcc@bcpiweb.com.

This Public Notice establishes certain procedural requirements relating to consideration of the remand of the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte*

rules.²⁵ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.²⁶ Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.²⁷

For further information regarding this proceeding, contact Denise Coca, Competition Policy Division, Wireline Competition Bureau, 202-418-0574, or Tim Stelzig, Competition Policy Division, Wireline Competition Bureau, 202-418-0942.

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²⁵ See 47 C.F.R. §§ 1.1200, 1.1206.

²⁶ See 47 C.F.R. § 1.1206(b).

²⁷ *Id.*